IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-5768

FRANK XAVIER FRANCISCO, PETITIONER,

v.

J. S. GATHRIGHT, Superintendent, Bland Correctional Farm, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 5, 1972—Petition for Writ of Habeas Corpus and request to proceed in forma pauperis received by United States District Court for the Eastern District of Virginia, Alexandria, Virginia.

October 26, 1972—Order issued (1) denying request for to proceed in forma pauperis, (2) directing respondent to answer Petition for Writ of Habeas Corpus, and (3) withholding execution to allow petitioner to submit filing fee.

October 31, 1972—Filing fee paid; Petition for Writ of Habeas Corpus docketed.

November 17, 1972—Answer to Petition for Writ of Habeas Corpus filed.

January 23, 1973—Order entered granting summary judgment in favor of respondent.

February 12, 1973—Notice of Appeal, Application for Certificate of Probable Cause, Motion to Proceed on Appeal In Forma Pauperis filed.

February 12, 1973—Order entered granting certificate of probable cause; order entered granting motion to proceed in forma pauperis on appeal.

February 12, 1973—Petitioner's Motion for Stay Proceedings in Circuit Court of Fairfax County filed.

February 16, 1973—Order entered Denying Petitioner's Motion for Stay of Proceedings.

August 27, 1973—Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

FRANK XAVIER FRANCISCO
Full name and prison number (if any) of Petitioner (prison no. 96916)

—vs—

J. S. GATHRIGHT, Superintendent Bland Correctional Farm, Route 2, Bland, Virginia 24315
Name and Title of Respondent

Case. No. 430-72-A-M
(To be supplied by the Clerk of the District Court)

PETITION FOR WRIT OF HABEAS CORPUS

[Filed Oct. 31, 1972, Clerk, U. S. District Court, Alexandria, Virginia]

Instructions—Read Carefully

In order for this petition to receive consideration by the District Court, it must be legibly handwritten or typewritten, signed by the petitioner and verified (notarized). It must set forth in a brief and clear form the answers to each applicable question. (If any question is not applicable, indicate by writing "None" or "Not Applicable". If you do not know the answer to any question, indicate by writing "Unknown".)

You must state *all* of your grounds for relief. If you fail to include any ground for relief which you now know about, you may lose your right to present it to any federal court in the future. If the form does not provide enough space for a complete answer to any particular question, you may finish your answer to that question on the reverse side of the page or on an additional page. You must make it clear to which question any such continued answer refers.

Since every petition for habeas corpus must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Therefore, you must take care to assure that all answers are true and correct.

If you are not a pauper, you must pay the filing fee of $5.00 by check or money order payable to the Clerk, U. S. District Court.

If you cannot pay the filing fee, you may seek to proceed *in forma pauperis*. In this case you must complete the affidavit (attached at the back of this form) setting forth information which establishes that you are unable to pay the fees and costs of the habeas corpus proceeding.

When the petition is completed, the original and two copies should be mailed to the Clerk of this Court. You may keep the fourth copy.

Place of Detention:

Your petitioner, Frank Xavier Francisco, is now actually unjustly and unlawfully imprisoned and restrained of his liberty and detained under color of the authority of the Commonwealth of Virginia at *Bland Correctional Farm, Bland, Virginia 24315*, in the custody of *J. S. Gathright, Superintendent*.

A. Criminal Trial

1. Give the name and location of the court which imposed the sentence or sentences from which you seek relief.

The sole claim and authority by virtue of which the petitioner is restrained of his liberty is a judgment, and a committment issued thereunder, of the *Circuit Court of Fairfax County, a court of the Commonwealth of Virginia, within this judicial District, located at 4000 Chain Bridge Road, Fairfax County, Virginia 22030*, which judgment was rendered in connection with criminal case No. 16,767.

2. State the offense or offenses for which sentence was imposed.

The offense for which sentence was imposed was set forth in an indictment (a copy of which is attached hereto as Exhibit A) returned on the 17th day of May, 1971 and charging that petitioner, on the 28th day of February, 1971, in the County of Fairfax did *unlawfully and feloniously, knowingly or intentionally possess with intent to distribute, a controlled drug, to wit: heroin, in violation of Section 54-524.101(a) of the 1950 Code of Virginia, as amended*.

3. State the date on which the sentence was imposed and the length of the sentence. (If more than one sentence was imposed, state whether they are consecutive (to be served

one after another) or concurrent (all to be served at the same time).)

On or about the *28th day of May, 1971,* the petitioner was sentenced to *eight years* in the state penitentiary at hard labor.

4. Check which plea you made:

GUILTY	NOT GUILTY
	X

5. If your plea was "Not Guilty," were you convicted by a judge or a jury?

Judge	Jury
	X

6. Did you appeal the conviction? *Yes* [by way of Petition For Writ of Error following a Notice of Appeal and Assignments of Error (a copy of which is attached hereto as Exhibit B).]

7. If you answered "yes" to question 6, list:

the name of each court to which you appealed or sought reversal

Supreme Court of Virginia

the result in each appellate court and the date of the result:

On or about the 14th day of December, 1971, the Supreme Court of Virginia rendered an opinion (a copy of which is attached hereto as Exhibit C) that there was no reversible error in the judgment complained of, and being of that opinion, rejected the Petition for Writ of Error and refused the writ of error and supersedeas, the effect of which was stated to affirm the judgment of the Circuit Court of Fairfax County.

8. State the reasons why your conviction or sentence is unlawful. Include facts. You must state all the claims which you know about. Be as brief as possible; if enough space is not provided on this page for your answer, you may complete your answer on the reverse side of this page or on an additional page.

A. Your petitioner states that the aforesaid judgment and commitment are void and without authority of law, the court rendering and issuing the commitment was without jurisdiction to do so, and the imprisonment of the petitioner

is in violation of the Constitution of the United States as hereinafter shown.

B. By reason of the nature of the charge under which petitioner was tried, i.e. possession of heroin with intent to distribute, there could have been no conviction had certain hereinafter specified foil packets and testimony relating thereto not been introduced into evidence over petitioner's objection.

C. On the 18th day of May, 1971, petitioner's counsel filed a Motion to Supress Evidence (a copy of which is attached hereto as Exhibit D) including these packets. A hearing on the motion was held on 21 May 1971 before the Honorable Burch Millsap, Circuit Court of Fairfax County. The court took the motion under advisement, and on May 28, 1971, the date of petitioner's trial, the court, having received a Memorandum of Points and Authorities in Support of the Motion (a copy of which memorandum is attached hereto as Exhibit E), permitted introduction into evidence of these packets. (The transcript of the May 21, 1971 hearing on the Motion to Suppress Evidence is hereinafter designated as *M. Tr.* ——; the transcript of the May 28, 1971 proceedings is hereinafter designated as *T. Tr.* ——.)

D. Petitioner has contended at every stage of the state proceedings following his arrest, and does contend herein, that the introduction of the foil packets and testimony relating thereto into evidence is a violation of due process of law in contravention of his rights under the Fourth and Fourteenth amendments to the Constitution of the United States [see Exhibit E] insofar as:

First: The arrest and search that produced the foil packets occurred without probable cause;

Second: Even if probable cause had existed, the aforesaid arrest and search were illegal, having been predicated upon a forcible entry of petitioner's dwelling without a warrant, and having occurred in the absence of exigent circumstances.

Third: Notwithstanding the questions of probable cause and forcible entry of a dwelling without a warrant, the permissible scope of a search and seizure incident to the petitioner's arrest was exceeded.

E. In relation to the contentions listed in paragraph 8D above, the following circumstances surrounding the aforementioned introduction into evidence are submitted:

(a) On February 27, 1971, the Fairfax County Police Department received information from one Robert De Bruin that petitioner had heroin and was "cutting it up" for distribution. (*M. Tr.* 20).

(b) No specific evidence of the reliability of the informer De Bruin was presented to any court.

(c) The Commonwealth attempted to show that the arresting Officer Luzi reasonably believed De Bruin to be reliable through a mere allegation by Officer Luzi that De Bruin had been reliable in the past (*M. Tr.* 8) and that the police had received complaints somehow relating to defendant (*M. Tr.* 7).

(d) Officer Luzi did not specify the nature of these complaints or how they concerned the defendant, and was unable to recall the time relation between the informer's alleged earlier reliable information and the night in issue (*M. Tr.* 8).

(e) In connection with a challenge to the informer's reliability (and thus to the existence of probable cause), it was shown that the informer De Bruin was known to Officer Luzi as a drug addict (*M. Tr.* 18), had been arrested by Officer Luzi for sale of heroin (*M. Tr.* 17-18), and was acting as an informer knowing that his activity in this regard would be brought to the prosecutor's attention (*M. Tr.* 19).

(f) In connection with a challenge to the informer's reliability (and thus to the existence of probable cause), petitioner's counsel was not permitted to elicit Officer Luzi's testimony with respect to the reliability of addicts generally (*M. Tr.* 20).

(g) Sometime near midnight and after receipt of the aforesaid information set forth in paragraph 8E(a) above, Officer Luzi accompanied De Bruin and others to the garden apartment occupied by petitioner.

(h) De Bruin entered the apartment, and the arresting officer observed the apartment interior from the patio through a thin curtain over a window.

(i) It was arranged that De Bruin would give petitioner sixty dollars in marked funds if De Bruin observed heroin for sale in the apartment, and De Bruin was to then lock himself in the bathroom to prevent its disposal.

(j) Officer Luzi did not intend to arrest petitioner in the absence of a signal from the informer as previously arranged (*M. Tr.* 22).

(k) No evidence was presented that De Bruin ever saw heroin for sale in the apartment.

(l) While in the apartment, De Bruin conversed with petitioner and gave petitioner ten dollars owed to petitioner (*T. Tr.* 38).

(m) In urging support for the existence of probable cause by reason of corroboration of the informer's information through personal observation of Officer Luzi, the Commonwealth of Virginia relied upon the Officer's trial testimony (much after the motion to suppress was denied) that he felt that he had observed a sales transaction.

(n) No evidence was presented that the officers observed anything but the conversation and the ambiguous act of the passage of money which was in fact the debt payment.

(o) After observing these events, Officer Luzi and other officers knocked at the apartment door. With the chainlock remaining secured, Robert Geisler, another occupant of the apartment, opened the door. The officers broke the chainlock to enter the apartment following Geisler's attempt to close the door when the officers identified themselves. In the bedroom, Officer Luzi with his gun drawn, confronted petitioner, ordered him to lie on the floor at the foot of the bed, and searched him (*T. Tr.* 20).

(p) Both the arrest and search occurred without a warrant.

(q) A Justice of the Peace is available near the jail at all times and was in fact available when petitioner was brought in after his arrest. (*M. Tr.* 24).

(r) No evidence of exigent circumstances giving rise to the need for a forcible entry into the dwelling without a warrant was presented to the Court; Officer Luzi simply stated that he was concerned with his accountability for the sixty dollars in marked funds (*M. Tr.* 24).

(s) In Brief in Opposition to the aforementioned Petition For Writ of Error identified in paragraph 6 above, the Commonwealth of Virginia argued that exigencies are created solely because narcotics are thought to be involved.

(t) Officer Luzi found 10 foil packets in petitioner's pants pocket, 38 foil packets on the desk next to the bed, and some marked money on the floor adjacent the dresser.

(u) In connection with the scope of the search and as to the 38 foil packets on the desk, Officer Luzi testified that he believed they were out of petitioner's reach when petitioner

was secured, face down on the floor under cover of the officer's gun.

(v) Further, there was no evidence presented that the packets were readily and clearly distinguishable as contraband.

F. Petitioner has contended in the state court proceedings and does here contend, that the statute under which he was convicted is unconstitutional, (at least as applied to him) a denial of due process of law in contravertion of his rights under the Fourteenth Amendment to the Constitution of the United States, particularly insofar as it provides in Va. Code § 54-524.101(a) that conviction "may be based solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed."

G. In relation to the contention set forth in paragraph 8F above, the following factual submissions are made:

(a) There was evidence presented that petitioner at the time of his arrest was addicted to narcotics and had a narcotics habit in an amount equivalent to the daily use of up to 12 of the packets introduced into evidence (*T. Tr.* 119).

(b) No evidence was presented as to the reasonableness of the statutory presumption of an intent to distribute in regard to a four to eight day supply in the hands of an addict.

(c) Petitioner's counsel was not permitted to question a witness (McMillan), who was a former heroin addict (*T. Tr.* 104-105), as to whether narcotics addiction was of a compulsive nature (*T. Tr.* 112-113) so as to form a basis for an instruction on pharmacological duress despite the statutorily permitted presumption.

(d) Requested instruction no. 4 was refused (*T. Tr.* 133) and at the same time an instruction on statutorily permitted presumption was given.

C. State Habeas Corpus

9. Before filing this petition, did you file in connection with the sentence or sentences of which you complain any petition for habeas corpus in a state court.

No. (Your petitioner has, however, exhausted the remedies available in the courts of the Commonwealth of Virginia, within the meaning of 28 U.S.C. § 2254, insofar as each and every issue, claim and ground set forth in part 8 above was presented and adversely determined at his trial

and was asserted as reversible error in the aforesaid Petition For Writ of Error, identified in paragraph 6 above.

10. If you answered "yes" to question 9, list with respect to each such petition the name and location of the court in which each was filed, and the date when you filed each petition:

Not Applicable

the result of each petition and the date of the result:

Not Applicable

11. Did you appeal from the disposition of your petition for habeas corpus in the state court?

Not Applicable

12. If you answered "yes" to question 11, list the name of each court to which you appealed or sought reversal

Not Applicable

the result and date in each appellate court:

Not Applicable

D. Previous Federal Habeas Corpus

13. Before filing this petition, did you file with respect to the sentence or sentences of which you complain any previous petition for habeas corpus in any Federal court?

No. (If your answer to this question is "no", you do not need to answer questions 14 through 16).

14. If you answered "yes" to question 13, list with respect to each such petition the name and location of the court in which each was filed:

Not Applicable

the result of each petition and the date of the result:

Not Applicable

15. Did you appeal from the action on the previous petition?

Not Applicable

16. If you answered "yes" to question 15, list the name of each court to which you appealed or sought reversal.

Not Applicable

the result in each court and the date of that result:

Not Applicable

/s/ Daniel C. Kaufman

DANIEL C. KAUFMAN
6018 Craig Street
Springfield, Virginia 22150

Of Counsel:
Joel M. Freed
644 Timberbranch Parkway
Alexandria, Virginia

/s/ Francis Xavier Francisco
Petitioner's Signature

State of Virginia
City/County of Bland

The above named petitioner, being first duly sworn, says that he has signed the foregoing petition, and that every statement contained therein is true and correct, to the best of his knowledge and belief and that, to the best of his knowledge, all grounds for relief from the sentence or sentences complained of are set forth herein.

/s/ Francis Xavier Francisco
Petitioner's Signature

Subscribed and sworn to before me this 26 day of September, 1972.

Illegible name My commission expires: August 4.
Notary Public

The petition will not be filed without payment of court costs unless the petitioner is entitled to proceed in forma pauperis and has executed the affidavit on page 5. (See instructions, page 1).

[In Forma Pauperis Affidavit and Exhibits A-E Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

[Caption Omitted in Printing]

ANSWER

Now comes the respondent, by counsel, and for his answer to the petition for writ of habeas corpus, says as follows:

1. Petitioner is now being detained pursuant to a judgment of the Circuit Court of Fairfax County, Virginia, of May 28, 1971, wherein the petitioner was convicted of possession of a controlled drug with intent to distribute and sentenced to a term of eight years in the Virginia State Penitentiary. (See Exhibit I, copy of prison record.)

2. The allegations of the petition herein appear to be as follows:

(a) Illegal search and seizure.
(b) Unconstitutionality of the statutory presumption relating to possession with intent to distribute.

3. Respondent says that petitioner appealed his conviction to the Virginia Supreme Court, and his petition for writ of error was denied and his conviction affirmed by an Order entered December 14, 1971. (See Exhibit II, copy of petition for writ of error, and copy of brief in opposition.) Respondent admits that both of the allegations of the petition herein were raised in said petition for writ of error, and therefore, petitioner has exhausted his State court remedies.

4. As to allegation (a) of the petition herein relating to illegal search and seizure, respondent denies that the arrest of the petitioner and the subsequent search and seizure without a warrant was invalid or illegal, and therefore, the admission of evidence obtained thereby was not improper. Respondent says that the arresting officer had probable cause to make the arrest, and that the subsequent search and seizure was valid as being pursuant to a lawful arrest. The probable cause was grounded on information received from an informer who was identified and who had given reliable information in the past, as well as who had dealt with the petitioner on previous occasions relating to his illegal activities. Furthermore, the arresting officer had an opportunity

to observe the defendant in action, and when police officers attempted to enter the petitioner's premises, their entry was barred in a very suspicious manner.

5. As to allegation (b) of the petition herein, respondent admits that said allegation would appear to have merit in light of *Sharp* v. *Commonwealth*, — Va. — (October 9, 1972). Under the holding in *Sharp*, it would appear that the granting of Instruction G in the petitioner's trial constituted reversible error, and petitioner would be entitled to a new trial. Respondent says further, however, that it should be left up to the State courts to determine whether the petitioner's case is controlled by *Sharp* or whether there are sufficient facts to differentiate or distinguish petitioner's case from *Sharp*. Respondent says, therefore, that as to this allegation, the petition should be dismissed without prejudice to allow the petitioner to proceed in the State courts on said allegation. *Stonebreaker* v. *Smyth*, 163 F.2d 498 (4th Cir. 1947).

6. Respondent denies each and every allegation of the petition not specifically admitted herein.

7. Respondent says that arrangements are being made to forward to this Court the records of petitioner's State court trial.

WHEREFORE, respondent prays that the petition be denied and dismissed.

JOHN S. GATHRIGHT,
Superintendent of
Bland Correctional Farm

By GILBERT W. HAITH
Counsel

Gilbert W. Haith
Assistant Attorney General
911 East Broad Street
Richmond, Virginia 23219

[Certificate of Service and Exhibits I & II
Omitted in Printing]

[COMPLAINT AND ARREST WARRANT]

COMMONWEALTH OF VIRGINIA, COUNTY OF FAIRFAX, TO-WIT

COMPLAINT

I, Inv. Luzi, whose address is Fairfax Co. Police do hereby complain that on the 28 day of Feb. 1971, Frank Xavier Francisco did unlawfully & feloniously and knowingly possess a control drug with the intent to dispense heroin in viol. of Sec. 54-524-101A of the 1950 Code of Va. as amended.

Given under my hand this the 28 day of Feb., 1971.

Inv. Luzi
Complainant

Subscribed and sworn to before me this the 28 day of Feb., 1971.

James E. Moeller
Justice of the Peace

WARRANT OF ARREST

To the Sheriff, Special Policeman, or to any County Police Officer or State Police Officer, Greeting:

Whereas, complaint has been made on oath to me, the undersigned Justice of the Peace for the County aforesaid, on the information of Inv. Luzi, that on the 28 day of Feb., 1971, in the County aforesaid Frank Xavier Francisco did unlawfully, feloniously and knowingly possess a control drug with the intent to dispense heroin in viol. of Sec. 54-524-101A of the 1950 Code of Va. as amended.

These are therefore in the name of the Commonwealth, to command you forthwith to apprehend and bring before the Fairfax County Court, the body of said Frank Xavier Francisco at Fairfax, Va. on the 8 day of April, 1971, at 10:00 o'clock A.M., to answer the said complaint, and to be further dealt with according to law. And have then and there this wararnt, with your return thereon.

Given under my hand this 28 day of Feb., 1971.

/s/ James E. Moeller
Justice of the Peace for Fairfax County, Virginia

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA vs. FRANK XAVIER FRANCISCO	Indictment for Possession of a Controlled Drug with Intent to Distribute

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Fairfax, and now attending the said Court at its May Term, 1971, upon their oaths present that Frank Xavier Francisco, on the 28th day of February, 1971, in the County of Fairfax, did unlawfully and feloniously, knowingly or intentionally possess with intent to distribute, a controlled drug, to-wit: heroin, in violation of Section 54-524.101(a) of the 1950 Code of Virginia, as amended, against the peace and dignity of the Commonwealth.

Witnesses called by the Court,
sworn and sent to testify
before the Grand Jury:

Inv. Luzi, Fairfax County Police Dept.

Teste: This 17th day of May, 1971

W. FRANKLIN GOODING
Clerk of said Court

By EDWARD E. YOUNG

A TRUE BILL. ☒
NOT A TRUE BILL. ☐

/s/ Illegible
Foreman

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA v. FRANK FRANCISCO	Cr. No. 16-767

MOTION TO SUPPRESS EVIDENCE

[Filed May 18, 1971, W. Franklin Gooding, Clerk of the Circuit Court of Fairfax County, Va.]

Defendant, by counsel, moves this Honorable Court to suppress evidence seized from defendant's person and residence on or about 28 February 1971 by Inspector William Luzzi and other officers and agents of the Fairfax County Police Department. Defendant requests that the tangible evidence seized and any testimony relating thereto be excluded from admission in any trial or trials of the above identified case.

As grounds for this motion, counsel states that the evidence is the fruit of a warrantless arrest and search not based on probable cause or required by exigent circumstances, and includes defendant's personal papers. This evidence was therefore seized in violation of defendants rights under the Fourth and Fifth Amendments of the United States Constitution and under Section 8 of the Virginia Constitution. Such evidence may not be used by the Commonwealth, directly or indirectly.

Respectfully submitted,
/s/ Daniel C. Kaufman
DANIEL C. KAUFMAN
4600 S. Four Mile Run Dr.
Arlington, Virginia 22204
671-0942

[Certificate of Service Omitted in Printing]

IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

[Caption Omitted in Printing]

[ORDER TAKING MOTION TO SUPPRESS EVIDENCE UNDER ADVISEMENT]

This 21st day of May, 1971, came the Commonwealth, by her Attorney, and the defendant, FRANK XAVIER FRANCISCO, who stands indicted for a felony, to-wit: possession of a controlled drug with intent to distribute, being confined in jail, was brought into Court and put to the bar of the Court in custody of a Deputy Sheriff, and also appeared Daniel Kaufman, Counsel for the defendant.

Thereupon, the Court Reporter was sworn.

And this case came on to be heard on the Motion to Suppress Evidence filed herein in writing by Counsel for the defendant. The Court proceeded to hear evidence and argument of Counsel, and in consideration whereof, the Motion to Suppress is hereby taken under advisement.

And the defendant is remanded to jail.

/s/ Burch Millsap
Judge

IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

[Caption Omitted in Printing]

[ORDER DENYING MOTION TO SUPPRESS EVIDENCE]

And it appearing to the Court that the Motion to Suppress was taken under advisement on May 21, and in consideration of the evidence heard and memoranda of law submitted by Counsel, the said Motion to Suppress is hereby denied.

Entered: May 28, 1971

/s/ Burch Millsap
Judge

[Letter Opinion Denying Motion to Suppress Evidence]

Fairfax County Courthouse,
Fairfax, Virginia, 22030,
May 28, 1971.

Mr. Ian M. Rodway,
Assistant Commonwealth's Attorney,
Fairfax, Virginia. 22030

Mr. Daniel C. Kaufman,
Attorney at Law,
4600 S. Four Mile Run Drive,
Arlington, Virginia.

Re: *Commonwealth v. Francisco.*

Gentlemen:

I have read the memoranda of law submitted and the Court is of the following opinion:

The entry by the Fairfax County Police Officer and the arrest of the defendant without a warrant is valid. The police officer had probable cause to make the arrest for the felony. The facts given to the police officer, together with the pre-arranged signal of the informer, were sufficient for the arrest without a warrant.

The entry by the police was not prior to making their identity known but after and also after informing the party opening the door of his arrest and also after the party opening the door attempted to block the same. (T. p. 13)

The police officers exceeded the permissible area of search without a warrant and all evidence obtained outside the permissible area of search will be excluded at the time of trial.

The motion to suppress is denied, except as to the evidence obtained beyond the area of the defendant's immediate control.

Very truly yours,
Burch Millsap.

BM :elc

[Extract from Transcript of Jury Trial]

[1] VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA, PLAINTIFF, vs. FRANK XAVIER FRANCISCO, DEFENDANT.	Docket No. 16767

Circuit Courtroom No. 2,
Fairfax County Courthouse,
Fairfax, Virginia,
Friday, May 28, 1971

The above-entitled cause came on for hearing before the HONORABLE BURCH MILLSAP, Judge of the Circuit Court of Fairfax County, Virginia, at 10:00 a.m.

APPEARANCES:

On behalf of the Commonwealth:

IAN M. RODWAY, ESQ.,
Assistant Commonwealth Attorney

On behalf of the Defendant:

DANIEL C. KAUFMAN, ESQ.

• • • •

[138] *INSTRUCTION NO. 6*

The Court instructs the jury that a conviction for possession of a controlled drug with intent to distribute may be based solely upon the evidence as to the quantity of the controlled drug unlawfully possessed.

• • • •

[Court Reporter's Certificate Omitted in Printing]

IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

[Caption Omitted in Printing]

[JUDGMENT OF CONVICTION]

This 28th day of May, 1971, came the Commonwealth, by her Attorney, and the defendant, FRANK XAVIER FRANCISCO, who stands indicted for a felony, to-wit: possession of a controlled drug with intent to distribute, being confined in jail, was brought into Court and put to the bar of the Court in custody of a Deputy Sheriff, and also appeared Daniel Kaufman, Counsel for the defendant.

Thereupon, the Court Reporter was sworn.

Thereupon, the defendant was arraigned upon the indictment returned herein, to which indictment the defendant, in person, entered a plea of not guilty.

Whereupon came a jury of twenty veniremen who were sworn on their voir dire, and the Attorney for the Commonwealth struck four names from said panel and Counsel for the defendant elected to strike only two names from said panel. Whereupon the following twelve jurors, to-wit: Charles F. Askey, John N. Crawford, Jene Crisman, Esley R. Davis, Richard F. Dittman, Roger J. Finch, William L. Flynn, Robert L. Gorman, Max C. Harman, Samuel R. Hawkins, John Makarczyk and Toussaint E. Summers were chosen by lot from the remaining fourteen names; and were sworn the truth of and upon the premises to speak.

Counsel for the defendant, out of the presence of the jury but in the presence of the defendant, renewed his motion to suppress made prior to trial, which motion the Court after hearing argument thereon, denied.

Whereupon the Court proceeded to hear opening statement on behalf of the Commonwealth and all the evidence on behalf of the Commonwealth, and upon conclusion of the evidence presented, Counsel for the defendant, out of the presence of the jury but in the presence of the defendant, made a motion to strike the evidence presented on behalf of the Commonwealth, which motion the Court after hearing argument thereon, denied.

The jury was recalled and heard opening statement on behalf of the defendant and all the evidence on behalf of the defendant.

The jury then received instructions of the Court, heard argument of Counsel and were sent to their room to consult

upon their verdict and after some time returned into Court and rendered the following verdict, to-wit:

"We, the jury, on the issue joined in the case of Commonwealth of Virginia vs. Frank Xavier Francisco, defendant, find the defendant guilty of possession of a controlled drug heroin with intent to distribute and fix his punishment at eight years.

/s/ Charles F. Askey
Foreman".

Whereupon, the jury was discharged.

Then Counsel for the defendant made a motion that this case be referred to the District Probation Officer for his investigation and report before sentencing, which motion the Court after hearing argument thereon, denied.

Thereupon, it was demanded of him, FRANK XAVIER FRANCISCO, if anything he knew or had to say why the Court should not proceed to pass sentence and judgment upon him, and nothing being offered or alleged in delay of judgment, it is ADJUDGED and ORDERED that FRANK XAVIER FRANCISCO do serve eight (8) years in the Penitentiary House of this Commonwealth, at hard labor.

The Court proceeded to advise the defendant of his right to appeal from the sentence imposed, including the right to have an attorney appointed for him and to have the attorney's fees, costs and expenses in connection with an appeal paid for him in the event he is financially unable to pay the same.

And the defendant having noted his intention to apply to the Supreme Court of Appeals for a writ of error, it is ADJUDGED and ORDERED that the execution of the sentence be, and the same hereby is postponed for a period of thirty days from this date to permit the defendant to be present and assist his Counsel in seeking such writ of error. It is further ADJUDGED and ORDERED that at the expiration of such thirty day period the defendant shall be conveyed to the Penitentiary in the manner provided by law, unless in the meantime he shall be let to bail.

The defendant shall be given credit for ninety (90) days served in jail.

The fee of the Court Reporter who recorded the evidence and incidents of trial in this case is hereby assessed as costs

in this case as provided by Sec. 17-30.1 of the 1950 Code of Virginia, as amended.

The Court certifies that the defendant was present at all stages of this trial.

And the defendant is remanded to jail to await transportation to the Penitentiary.

/s/ Burch Millsap
Judge

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

[Caption Omitted in Printing]

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

TO: W. FRANKLIN GOODING, ESQ.
Clerk, Circuit Court of Fairfax County
Fairfax, Virginia 22030

NOTICE IS HEREBY GIVEN that Frank Xavier Francisco appeals from a judgement entered upon a jury verdict by this Court on 28 May 1971 and announces his intention of applying for a writ of error to the Supreme Court of Appeals of Virginia.

ASSIGNMENTS OF ERROR

Defendant, by counsel, assigns as errors the following rulings of the Court:

1. The Court erred in holding that it had no jurisdiction to entertain a Motion to Suppress Evidence subsequent to a preliminary hearing binding Defendant over to the Grand Jury but prior to indictment.

2. The Court erred in restricting defense counsel's cross-examination of Officer William Luzi at the hearing on Defendant's written motion to Suppress Evidence on 21 May 1971 by refusing to permit counsel to question Officer Luzi concerning his opinion as to the reliability of drug addicts.

3. The Court erred in denying in part Defendant's written Motion to Suppress Evidence on 28 May 1971.

4. The Court erred in denying in part Defendant's oral Motion to Suppress Evidence on 28 May 1971.

5. The Court erred in ruling that a plastic bag containing 38 foil decks of heroin was within the area of defendant's immediate control at the time of its seizure.

6. The Court erred in permitting Officer William Luzi to testify concerning events of 27 and 28 February 1971 taking place adjacent to and within Defendant's apartment.

7. The Court erred in permitting Thaddeus E. Tomczak to testify as the Commonwealth's Chemist.

8. The Court erred in admitting into evidence Commonwealth's Exhibits 1-5.

9. The Court erred in permitting Robert DeBruin to testify as to alleged prior sales of narcotics not resulting in Defendant's arrest or conviction.

10. The Court erred in denying Defendant's Motion to Strike the Commonwealth's Evidence.

11. The Court erred in restricting defense counsel's direct examination of Stephen McMillan by refusing to permit counsel to question Mr. McMillan concerning the incidents and consequences of narcotics addiction.

12. The Court erred in giving Instruction F.

13. The Court erred in giving Instruction G.

14. The Court erred in refusing to give Instruction No. 4, as originally proffered.

15. The Court erred in refusing to give Instruction No. 4, as modified.

16. The Court erred in denying Defendant's motion to refer the case to the case to the probation officer for an investigation and report prior to imposition of sentence.

Respectfully submitted,

/s/ Daniel C. Kaufman
DANIEL C. KAUFMAN
Attorney for Defendant
2304 N. Kenmore Street
Arlington, Virginia 22207

[Certificate of Service Omitted in Printing]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA

FRANK XAVIER FRANCISCO,
APPELLANT

vs.

COMMONWEALTH OF VIRGINIA,
APPELLEE

Criminal No.

PETITION FOR WRIT OF ERROR AND SUPERSEDEAS (See p. 40)

DANIEL C. KAUFMAN
2304 N. Kenmore Street
Arlington, Virginia 22207

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF VIRGINIA

Appellant, Frank Xavier Francisco, is aggrieved by a final judgement entered by the Circuit Court of Fairfax County on 28 May 1971, in a proceeding wherein the appellant, Frank Xavier Francisco, was defendant and the Commonwealth of Virginia was plaintiff.

STATEMENT OF PROCEEDINGS

Defendant, Frank Xavier Francisco, was arrested on 28 February 1971 and charged with the felony of possession of a controlled drug (heroin) with intent to distribute, in violation of section 54-524.101(a) of the Code of Virginia of 1950 as amended.

A preliminary hearing was held on 8 April 1971 before the Honorable J. Mason Grove, Fairfax County Court. Defendant was bound over for the Grand Jury next meeting on 17 May 1971.

On 16 April 1971, defense counsel filed, in the Circuit Court of Fairfax County, a Motion to Suppress Evidence and scheduled a hearing thereon for 7 May 1971. On 7 May the motion came on for hearing before the Honorable William G. Plummer, Fairfax County Circuit Court. Prior to the presentation of evidence, the Court heard argument as to its jurisdiction. The Court held that, prior to indictment, it lacked jurisdiction to entertain the motion.

An indictment was returned by the Grand Jury on 17 May 1971 charging defendant with possession of a controlled drug, to-wit: heroin, in violation of section 54.524.101(a) of the Code of Virginia of 1950, as amended.

On 18 May 1971 defense counsel filed, in the Circuit Court of Fairfax County, a Motion to Suppress evidence. A hearing on the motion was held on 21 May 1971 before the Honorable Burch Millsap, Fairfax County Circuit Court. Officer William Luzi, Fairfax County Police Department was the only witness. Defense counsel was not permitted to elicit Officer Luzi's opinion as to the reliability of drug addicts or users generally. After presentation of evidence and argument, the Court took the motion under advisement. On 28 May 1971, the Court denied the motion in part, holding that only evidence seized outside the defendant's immediate control would be excluded at trial.

On 28 May 1971, a jury trial commenced before Judge Millsap. Defendant's motion to suppress was orally renewed and denied. A hearing was held outside of the presence of the jury to determine what evidence would be excluded under the ruling on the suppression motion. Following testimony by Officer Luzi, the Court ruled that 10 foil packets of alleged heroin found in defendant's pocket and 38 foil packets of alleged heroin found on a desk in the bedroom would not be excluded.

The Commonwealth called Robert DeBruin, a police informer, Thaddeus E. Tomczak, a forensic chemist, and Officer Luzi. Robert DeBruin was permitted to testify that on occassions prior to the offense charged, defendant had sold heroin to him. Thaddeus Tomczak testified as to his analysis of the foil packets' contents. Officer Luzi testified as to the defendant's arrest and the events leading thereto, and to the seizure of the foil packets. The Commonwealth moved into evidence a photograph of a desk in defendant's bedroom (Exhibit 1), an evidence envelope containing 10 foil packets of heroin (Exhibit 3), an evidence containing 38 foil packets of heroin (Exhibit 2), a chemist's report on the contents of the foil packets (Exhibit 4), and two transmittal envelopes (Exhibit 5).

At the close of the Commonwealth's case, defense counsel moved to strike the Commonwealth's evidence, principally on the ground that the Commonwealth had failed to introduce any competent evidence of venue; the motion was denied.

Stephen McMillan was the sole defense witness. Defense counsel was not permitted to examine him as to the incidents and consequences of drug addiction. He testified that defendant was addicted to heroin.

The Commonwealth and defense proffered instructions. The Court ruled that all of Commonwealth's instructions would be given; and that all of defense counsel's instructions, except number 4, would be given. Defense counsel requested the Court to give instruction 4 modified by deleting the second paragraph thereof; the request was denied.

Following instructions and final arguments the jury retired and later returned a verdict of guilty as charged with a sentence of eight years confinement.

Defense counsel moved to refer the case to the probation office for a pre-sentence investigation and report. The mo-

tion was denied and sentence imposed. Execution of the sentence was stayed pending perfection of an appeal.

ERRORS ASSIGNED

1. Holding by the Court that it had no jurisdiction to entertain a motion to suppress evidence subsequent to a preliminary hearing but prior to indictment.

2. Restriction by the Court of defense counsel's cross-examination of Officer Luzi at the hearing on Motion to Suppress Evidence by refusing to permit counsel to elicit Officer Luzi's opinion as to the reliability of drug addicts and users generally.

3. Denial of Defendant's Motion to Suppress Evidence on 28 May 1971.

4. Denial of defendant's oral motion to suppress evidence on 28 May 1971.

5. Ruling that a plastic bag containing 38 foil packets of heroin was within the area of defendant's immediate control at the time of its seizure.

6. Permitting Officer Luzi to testify concerning events of 27 and 28 February 1971 taking place adjacent to and within defendant's apartment.

7. Permitting Thaddeus E. Tomczak to testify as the Commonwealth's chemist.

8. Admitting into evidence Commonwealth's Exhibits 1-5.

9. Permitting Robert DeBruin to testify as to alleged prior narcotics sales by defendant not resulting in arrest or conviction.

10. Denying defendant's motion to strike the Commonwealth's evidence.

11. Restriction of defense counsel's direct examination of Stephen McMillan by refusing to permit counsel to question him concerning the incidents and consequences of narcotics addiction.

12. Giving Instruction F.

13. Giving Instruction G.

14. Refusing to give Instruction 4, as originally proffered.

15. Refusing to give Instruction 4, as modified.

16. Refusing to refer the case to the probation office for an investigation and report prior to imposition of sentence.

STATEMENT OF QUESTIONS PRESENTED

1. Whether the Circuit Court had jurisdiction to entertain a motion to suppress evidence filed subsequent to a preliminary hearing binding defendant over to the Grand Jury but prior to indictment.

2. Whether defendant's warrantless arrest was based on probable cause.

3. Whether probable cause alone is sufficient to authorize a police officer to validly make a forcible entry into a dwelling to arrest a person therein without an arrest warrant.

4. Whether the warrantless, forcible entry of defendant's dwelling to effect his arrest was necessitated by exigent circumstances.

5. Whether the arresting officers exceeded the permissible scope of a search and seizure incident to defendant's arrest.

6. Whether, in a prosecution for possession of narcotics with intent to distribute, evidence of prior narcotics sales can be introduced absent a showing of nearness in time to the offense charged.

7. Whether a narcotics addict can be punished for the possession, in his home, of narcotics to supply his own habit.

8. Whether a jury must be instructed that drug addiction is not a crime, where there is evidence that defendant is a drug addict.

9. Whether the Commonwealth proved venue.

10. Whether the jury can be instructed that constructive possession of narcotics is sufficient to authorize a conviction under section 54-524.101(a) of the Code of Virginia of 1950, as amended, where the instruction defining the elements of the offense omits the statutory language "knowingly or intentionally."

11. Whether a conviction for possession of a controlled drug with intent to distribute may be based solely on evidence as to the quantity of the drug possessed.

12. Whether it is proper to instruct the jury that conviction for possession of a controlled drug with intent to distribute may be based solely on evidence as to the quantity of the drug possessed.

13. Whether the limitation of mandatory reference to the probation office for investigation and report contained in section 53-278.1 of the Code of Virginia of 1950, as amended, to cases not tried by a jury is Constitutional.

14. Whether the Court abused its discretion by refusing to refer the case to the probation office for an investigation and report prior to sentencing.

STATEMENT OF FACTS

On 27 February 1971, Officer Luzi of the Intelligence Squad, Fairfax County Police Department, received information from Robert DeBruin, an informer, that defendant allegedly had in his apartment one-quarter ounce of heroin and was in the process of "cutting it up" for distribution. DeBruin was known to Officer Luzi as a drug addict and had been arrested by Officer Luzi for sale of heroin. After his arrest, DeBruin was told by Officer Luzi that anything he did would be brought to the attention of the Commonwealth Attorney and that Officer Luzi would like his assistance. Officer Luzi was informed that DeBruin had arranged to purchase drugs from defendant later that night. At about midnight, DeBruin, accompanied by Officer Luzi, two other Fairfax County policemen and another informer went to the Grandview Apartments. Officer Luzi searched DeBruin and gave him sixty dollars in marked funds. It was arranged that DeBruin would give the defendant the money if he observed drugs in the open and would then lock himself in the bathroom to prevent their disposal.

DeBruin entered defendant's apartment while Officer Luzi observed the interior of the apartment from the patio through the thin curtains over the window. DeBruin and defendant had a conversation; DeBruin gave defendant ten dollars that he owed defendant. After observing these events, Officer Luzi and the other officers knocked at the door. It was opened by Robert Geisler, another occupant of the apartment, but the chain-lock remained secured. When the officers identified themselves and stated that Geisler was under arrest, he attempted to close the door. The officers broke the chain-lock to enter the apartment. Geisler was secured but not actually arrested. Officer Luzi, gun drawn, confronted defendant in the bedroom, ordered him to lie on the floor at the foot of the bed, and searched him. In defendant's pants pocket, Officer Luzi found 10 foil packets of heroin; on a desk next to the bed he observed a plastic bag containing 38 foil packets; on the floor adjacent a dresser he observed the marked money. He seized these items.

Defendant was taken to the Fairfax County Jail where he was processed and held in lieu of $10,000. bond. Officer Luzi had neither an arrest warrant for defendant's person nor a search warrant for the apartment at the time of the arrest. A Justice of the Peace is available near the jail at all times and was in fact available when defendant was brought in.

The Grandview Apartments is a garden apartment complex located along Columbia Pike between Jefferson Street and Carlyn Springs Road. The sign indicating the Arlington County—Fairfax County Border is located in the median strip of Columbia Pike between Jefferson Street and Carlyn Springs Road.

ARGUMENT AND AUTHORITY

• • • •

INTENT BASED ON QUANTITY

(Error 13)

The statute under which defendant was charged provides that conviction "may be based solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed." Va. Code § 54-524.101(a). Instruction G, given over defense objection, paraphrases this language.

Counsel submits that the quoted statutory presumption is unconstitutional as a denial of due process, the giving of instruction G was thus error.

> [A] criminal statutory presumption must be regarded as "irrational" or "arbitrary" and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.

Leary v. United States, 395 U.S. 6, 36 (1969) (footnote omitted). The singularly opaque language of the statute clouds this determination somewhat. The fact proved is the quantity of drug possessed; the fact presumed is the intent to distribute. Can it "be said with substantial assurance" that the intent to distribute "is more likely than not to flow from" the quantity of drug possessed, required for constitutionality under *Leary*? The answer is plainly no since the quantity, type, and form of drug varies in each prosecution. While not controlling, it should be noted that Fairfax

County Commonwealth Attorney Robert F. Horan, Jr. has stated that "the question remains as to whether this proviso . . . creates a valid presumption upon which a conviction could be based." Virginia State Bar Ass'n, *Criminal Justice Seminar*, VII-3 (Feb. 19, 1971).

Counsel further submits that giving instruction G was error in light of instructions already given. Instruction D described direct and circumstantial evidence; instruction E discussed circumstantial evidence and twice stated that conviction could be had "upon circumstantial evidence alone." At best, instruction G is an instruction on circumstantial evidence tied to particular direct evidence. Counsel concedes that with appropriate, competent evidence as to the range of dosage that could be expected for a particular drug, a jury could consider the quantity possessed as circumstantial evidence of an intent to distribute. However, "it is reversible error for a trial judge to single out for emphasis a part of the evidence tending to establish a particular fact." *Woods v. Commonwealth*, 171 Va. 543, 547-48, 199 S.E. 465, 467 (1938). In view of instructions D and E already given, it is urged that giving instruction G was error since it singled out for emphasis the quantity of heroin possessed.

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[Certificate of Service Omitted in Printing]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

FRANK XAVIER FRANCISCO,
APPELLANT,

vs.

COMMONWEALTH OF VIRGINIA,
APPELLEE.

} RECORD NO. .....

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF ERROR

Robert F. Horan, Jr.
Commonwealth's Attorney for Fairfax County
Fairfax County Courthouse
Fairfax, Virginia 22030

Counsel for Appellee

Daniel C. Kaufman
2304 N. Kenmore Street
Arlington, Virginia 22207

Counsel for Appellant

IN THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

FRANK XAVIER FRANCISCO,
APPELLANT,

VS.

COMMONWEALTH OF VIRGINIA,
APPELLEE.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF ERROR

To the Honorable Chief Justice and the Justices of the Supreme Court of Appeals of Virginia:

COMES NOW the Commonwealth in response to the Petition for Writ of Error filed herein by Frank Xavier Francisco and states that no error was committed in the Circuit Court of Fairfax County.

STATEMENT OF MATERIAL FACTS

Appellee in general agrees with the Statement of Facts in the Petition.

• • • •

ARGUMENT NINE

DID THE COURT ERR IN GIVING INSTRUCTION NO. 6 (T. TR. 138)?

Instruction No. 6 is the precise wording of a part of Section 54-524.101(a) of the 1950 Code of Virginia, as amended. The legislature, recognizing that one who distributes narcotics illegally presents a grave threat to the community, has seen fit to declare that possession of a quantity of a controlled drug may be used as the sole basis to convict one of possession with intent to distribute. It is submitted that this is a logical presumption and is not unconstitutional.

Moreover, in the case at bar there was far more evidence than the possession of forty-eight (48) packets of heroin. Defendant's prior sale to Robert DeBruin as well as the transaction on the night of his arrest were further factors which lead to his conviction of possession with intent to distribute.

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[Certificate of Service Omitted in Printing]

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 14th day of December, 1971.

The petition of Frank Xavier Francisco for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Fairfax County on the 28th day of May, 1971, in a prosecution by the Commonwealth against the said petitioner for a felony, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

A Copy,

Teste:

Howard G. Turner,
Clerk

By: Allen L. Lucy
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

FRANK XAVIER FRANCISCO,
PETITIONER,

v.

J. S. GATHRIGHT, Superintendent
Bland Correctional Farm,
RESPONDENT.

CIVIL ACTION NO.
430-72-A-M

ORDER

[Filed Jan. 23, 1973, Clerk, U. S. District Court, Alexandria, Virginia]

Frank X. Francisco attacks his state conviction for failure to suppress the evidence in that he alleges his arrest occurred without probable cause absent exigent circumstances and that the subsequent search exceeded its permissible scope. Moreover, he contends that an unconstitutional instruction relating to possession of narcotics with intent to distribute was improperly submitted to the jury.

An examination of the transcript of the suppression hearing (M. Tr.) and trial (T. Tr.) reveals that on February 27, 1971, Robert DeBruin informed Officer Luzi of the Fairfax County Police Department that the petitioner, Frank X. Francisco, possessed heroin and was in the process of cutting it up for distribution. (M. Tr. 20, 21) DeBruin admitted that he personally had previously purchased drugs from Francisco and was invited to procure more that evening. (M. Tr. 21, 25) DeBruin, moreover, was known to Luzi as being a drug addict with two recent arrest charges still pending against him for the sale and control of narcotics. (M. Tr. 17, 18) Luzi contended that DeBruin had indirectly given reliable information in the past although he did not specify the nature of the earlier complaints. (M. Tr. 8, 20) He had also indicated to DeBruin that the latter's present assistance would be brought to the attention of the Commonwealth Attorney. [DeBruin even testified at the preliminary hearing that he acted as

an informer "to clear" himself of drug charges with the understanding that something might be done for him if he helped. (T. Tr. 49, 52)]

Relying upon the information obtained from DeBruin, Luzi arranged a meeting with him for midnight outside of Francisco's apartment. At that meeting DeBruin was instructed to obtain entrance into the apartment and endeavor to purchase drugs with marked money which he was given. The police positioned themselves outside of the window of the apartment with the understanding that an observation, as seen through the thin curtains, of the passing of money from DeBruin to Francisco would be a signal to show that narcotics were visible and accessible. (M. Tr. 8, 26) The arrest was then to be based on this prearranged signal, that is, the "pass," although it was not contended that anyone saw Francisco hand DeBruin anything in exchange for the marked bills and no testimony indicated that DeBruin had actually seen heroin for sale in the apartment at the time of the signal. (M. Tr. 22, 25) [As a matter of fact, DeBruin testified at the trial that the initial exchange of money observed by the police outside of the window was the payment of a prior debt for drugs and not a new purchase. (T. Tr. 38, 41)]

Soon after DeBruin entered the apartment he made the "pass" by the window which then prompted the police to enter the apartment to arrest Francisco. Another person met the police at the door and attempted to prevent them from entering. The police proceeded to push through the door and arrest the defendant in the back bedroom. They confiscated ten (10) decks of heroin on his person and thirty-eight (38) more on a bureau near him. (M. Tr. 12, 13)

Evidence obtained by a search in violation of a defendant's constitutional rights is inadmissible. *Mapp* v. *Ohio*, 367 U.S. 643 (1961). Therefore, before a warrantless arrest is deemed proper, the prosecution must establish that probable cause existed for the arrest and that exigent circumstances obviated the requirement to procure a magistrate's independent judgment. *Beck* v. *Ohio*, 379 U.S. 95, 97 (1964); *McDonald* v. *United States*, 335 U.S. 451, 456 (1948). The lawfulness of a warrantless arrest, however, cannot be based on the reliability of an unknown informer. *Katz* v. *Peyton*, 334 F. 2d 77 (4th Cir.), *affirming*, 232 F. Supp. 131 (E. D. Va.), *cert. denied*, 379 U.S. 915 (1964), *rehearing denied*, 379 U.S. 984 (1965). Corroboration of

"the essential particulars," though, by an investigation prior to arrest may be sufficient to establish probable cause. *United States* v. *Irby*, 304 F. 2d 280 (4th Cir.), *cert. denied*, 371 U.S. 830 (1962).

In *Aguilar* v. *Texas*, 378 U.S. 108 (1964), the Court established a two-pronged test to measure the effect of an informant's reliability on a police officer's determination of probable cause. It must affirmatively appear to a neutral and detached magistrate that the officer was informed of some of the "underlying circumstances" from which it could be concluded that the informant was reliable and the information credible. There is a three-tiered method of analysis for testing the validity of an informant's conclusions. First, the information can be corroborated by the informant's knowledge of minute detail and particularity. Secondly, direct personal observation can assure first-hand knowledge of facts rather than mere suspicion or rumor. And finally, actual participation in the illegal activity carries its own degree of credibility since it is a declaration against penal interests.

Credibility and reliability can further be ascertained by an affiant's averment that the informant was known and has proven himself by having previously furnished other information which was instrumental in procuring convictions. Moreover, the affiant's own knowledge of the alleged suspect's reputation or subsequent observation of incriminating actions by the suspect may corroborate an informer's accusation. *See Spinelli* v. *United States*, 393 U.S. 410 (1969); *Manley* v. *Commonwealth*, 211 Va. 146, 176 S.E. 2d 309 (1970).

The standards where police act without a warrant are at least as stringent as those required for an affidavit. *Aguilar*, *supra*, at 111; *Whiteley* v. *Warden*, 401 U.S. 560 (1971); *McCray* v. *Illinois*, 386 U.S. 300, 305 (1967); *Wong-Sun* v. *United States*, 371 U.S. 471, 479 (1963). The mere existence of probable cause is not sufficient to justify noncompliance with the warrant procedure. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 451 (1971); *Angello* v. *United States*, 269 U.S. 20, 33 (1925). It is fully recognized that:

> The most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." "[T]he burden is on those seeking the exemption to show the need for it." (Citations omitted.) *Coolidge*, *supra*, at 455.

In reviewing the evidence presented at the suppression hearing in the case at bar, the basic issue is when probable cause was sufficiently established. The only proof apparent, prior to the window observation, to support the two-prong test of *Aguilar* was the informant DeBruin's admission against his penal interests that he had purchased narcotics in the past from the suspect Francisco. (M. Tr. 21) *United States* v. *Harris*, 403 U.S. 573 (1971). Additionally, there was DeBruin's statement that Francisco had told him he had recently bought a quarter pound of heroin and would sell him some if interested. (M. Tr. 20, 25) [Another informer, Carcio, also told the police the same story but it carries no extra weight since his information came from DeBruin. (M. Tr. 9)] There was not, however, any testimony that DeBruin had personally observed narcotics on Francisco or in his apartment prior to entering his home the night of arrest.

Officer Luzi did make the bare statement that DeBruin, known only at that point as a drug addict, had "indirectly" given reliable information in the past. (M. Tr. 8) This did little to support the informant's credibility and reliability since he did not specify the nature of the underlying circumstances of the earlier complaints. (M. Tr. 17, 18, 20) There was no evidence either that the information supplied as to other cases was instrumental in securing any convictions. To establish credibility and reliability, more than a mere assertion that an informer has given reliable information before is needed to provide a factual basis for crediting his report. *United States* v. *Harris*, *supra*, at 579; *Riggan* v. *Virginia*, 384 U.S. 152 (1966); *Wiles* v. *Commonwealth*, 209 Va. 282, 163 S.E. 2d 595 (1968). While it is further recognized that a police officer's (or affiant) own knowledge of a suspect's reputation can corroborate the truthfulness of an informant's accusation, "a bald and unilluminating assertion of suspicion," standing alone, is entitled to no weight. *Spinelli*, *supra*, at 414; *Nathanson* v. *United States*, 290 U.S. 41, 46 (1933). Such was the case here since Luzi did not know

the suspect personally but only by way of some unexplained "police department complaints." (M. Tr. 7)

It is similarly difficult to find that the act of passing the money in front of the window in itself corroborated the veracity of DeBruin's initial assertions for there was no incriminating conduct on the part of the suspect. Moreover, an informer's tip cannot be sustained by activities which "contain no suggestion of criminal conduct when taken by themselves—and they are not endowed with an aura of suspicion by virtue of the informer's tip." *Spinelli, supra,* at 418; *Nathanson, supra.*

While each stage of material proof, standing alone, failed to substantiate a showing of probable cause the totality of circumstances affirmed such a finding. First the declaration against penal interests by DeBruin of his involvement in criminal activity carried its "own indicia of credibility—sufficient at least to support a finding of probable cause to search. That the informant may be paid or promised a break does not eliminate the residual risk and opprobrium of having admitted criminal conduct." *Harris, supra,* at 583, 584. Luzi's statements, although vague, that DeBruin had given reliable information in the past and that some form of unspecified complaints had at least been received before on Francisco deserved some weight, if only slight, as being corroborative when balancing the probabilities. Finally, the passing of the money, when viewed by the police, served a legitimate purpose in that it was an action by DeBruin to *signal* to Officer Luzi that he, DeBruin, had now personally observed narcotics in Francisco's possession, an element not previously confirmed. (M. Tr. 8, 26) It is immaterial whether DeBruin had actually seen the drugs present or not, for what the police believed to be the interpretation of his signal is the subject of analysis. At this moment the test for the sufficiency of probable cause to arrest was ultimately fulfilled.

Whether the observation itself constituted an illegal search is another issue. Technically it was not a trespass to search the suspect or his premises but a procedure to enable the police to view a "signal" from the informant for the purpose of corroborating prior averments. It would have been no different than had the police waited for DeBruin to return from the apartment and confirmed his earlier allegation with direct personal knowledge. It is obvious that Francisco was not relying on the security of his apartment but rather upon his misplaced confidence that DeBruin would not reveal his wrongdoing. DeBruin was not a surreptitious observer but an invited guest who was knowingly given entry and the opportunity to view the contraband. *Hoffa* v. *United States,* 385 U.S. 293 (1966). *See also, United States* v. *White,* 401 U.S. 745 (1971). Since this observation was a method for executing a plan to view only the actions of the informant, no constitutional infirmity exists because the validity of the arrest was not bootstrapped by an unlawful search of the suspect. "The Fourth Amendment protects people, not places." *Katz* v. *United States,* 389 U.S. 347 (1967).

The assumption that the police had ample time to procure a warrant must also fail. Although there was not a substantial basis for a warrant to issue initially, the sufficiency of probable cause to arrest did arise at the apartment after the signal was given by DeBruin to the police. The realities of narcotic dealing then dictated that an arrest be pursued immediately. Since narcotics are easily disposed of either by destruction or sale, even late at night, "exigent circumstances" almost invariably exist. (M. Tr. 10, 26) Therefore immediate warrantless arrests based upon probable cause are imperative. *United States* v. *Irby, supra.*

Once it was established that the police lawfully entered the apartment to arrest the defendant then a search incident to that lawful arrest was legal. *Trupiano* v. *United States,* 334 U.S. 699 (1948). "It has long been settled that objects falling in plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." *Harris* v. *United States,* 390 U.S. 234 (1968). The thirty-eight (38) decks of heroin were easily recognizable as contraband since they were in transparent plastic bags on top of the dresser in the defendant's bedroom where he was arrested. (M. Tr. 13, T. Tr. 18)

Finally, Francisco attacks the constitutionality of the statutory presumption relating to possession with intent to distribute. The respondent admits in his answer that this allegation has merit in light of *Sharp* v. *Commonwealth,* 213 Va. 269, 192 S.E. 2d 217 (1972), and suggests that it should be left to the state courts to determine whether the petitioner's case is controlled by *Sharp.* This Court agrees and, provided the Commonwealth on its own initiative, affords the peti-

tioner a hearing within forty-five (45) days on this issue, this matter is dismissed without prejudice However, in light of the fact that Francisco has exhausted his remedies before on this issue, albeit prior to the decision in *Sharp*, leave is given petitioner, should such a hearing not be conducted, to apply to this Court for reinstitution of this action in order to have this Court consider the issue on its merits.

Accordingly, relief is denied on all grounds raised by the petitioner and it is ORDERED that summary judgment be granted in favor of the respondent.

The petitioner is advised that should be desire to appeal, written notice of appeal must be received by the Clerk of this Court within thirty (30) days from the date of this Order. In default of such notice, the Clerk is requested to return the state court records to the Clerk of the Circuit Court of Fairfax County.

The Clerk is further directed to send a copy of this Order to the petitioner, his counsel, the respondent and the Attorney General of Virginia.

/s/ illegible
United States District Judge

Alexandria, Virginia
January 23rd, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

[Caption Omitted in Printing]

MOTION FOR STAY OF PROCEEDINGS

Petitioner respectfully moves the Court, pursuant to 28 U.S.C. §§ 1651, 2251, to stay the proceeding captioned *Francisco* v. *Gathright*, sought to be initiated, in the Circuit Court of Fairfax County by attorney for respondent, Gilbert W. Haith, Assistant Attorney General of the Commonwealth of Virginia, on or about January 24, 1973. The grounds for this motion are set out below.

In October 1972 petitioner filed the instant habeas corpus petition, alleging that his conviction for possession of heroin with intent to distribute in the Circuit Court of Fairfax County was invalid on the grounds that evidence introduced against him should have been suppressed as the fruit of an unconstitutional search and seizure and that the court's instruction that the conviction "may be based solely upon evidence as to the quantity of the [heroin] possessed" was a denial of due process in that the statutory presumption, stated by the instruction, was irrational and arbitrary. On January 23, 1973 this Court granted summary judgment for respondent, ruling against petitioner on the merits of the search and seizure claim, and dismissing without prejudice the instruction claim to be dealt with in state court in light of an intervening decision of the Virginia Supreme Court, *Sharp* v. *Commonwealth*, 213 Va. 269, 192 S.E. 2d 217 (1972). On January 24, respondent moved the Circuit Court of Fairfax County to commence state habeas corpus proceedings, a copy of the motion is attached hereto as exhibit A. Petitioner has filed a notice of appeal in the instant case, seeking review of the Court's rulings on both issues in the petition.

The All Writs Act, 28 U.S.C. § 1651, provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Further, a "judge of the United States before whom a

habeas corpus proceeding is pending, may, before final judgment or . . . pending appeal, stay any proceeding against the person detained in any State Court . . . for any matter involved in the habeas corpus proceeding." 28 U.S.C. § 2251. Petitioner urges that there is a reasonable probability of success on the merits of the pending appeal, that he will be irreparably injured should the state court proceedings be allowed to continue, and that respondent will not be injured by a stay. Accordingly it is submitted that a stay of state court proceedings to preserve the status quo is both authorized and appropriate.

Petitioner respectfully submits that this Court erred in declining to reach the merits of the claim relating to the trial court's instruction. In *Roberts* v. *Lavallee*, 389 U.S. 40 (1967), the Supreme Court considered a strikingly similar situation. The state court had refused Roberts' request for a free transcript of the preliminary hearing on the ground that a state statute made no provision for transcripts without cost. Following conviction and exhaustion of appellate relief, Roberts collaterally attacked his conviction in district court. Habeas corpus relief was denied by the district court on the merits. Thereafter, the highest court of the state held that as a matter of constitutional law, indigent defendants are entitled to a free transcript. *See* 389 U.S. at 41. On appeal from the district court's denial of relief, the Court of Appeals, while acknowledging that Roberts had exhausted his state remedies.

> "thought the 'constitutional necessity for federal court intervention' was 'open to doubt' and that 'the question ought to be decided in favor of permitting a state court determination in the first instance.' Accordingly it dismissed the petition for habeas corpus without prejudice to renewal of the questions presented by petitioner after further proceedings in the [state] courts," 389 U.S. at 41-42.

The Supreme Court vacated the decision of the court of appeals noting:

> "Still more state litigation would be both unnecessarily time consuming and otherwise burdensome. This is not a case in which there is any substantial state interest in ruling once again on petitioner's case. We can conceive of no reason why the State would wish to burden its judicial calendar with a narrow issue the resolution of which is predetermined by established federal principles." 389 U.S. at 43.

As the court has more recently pointed out, the

> "accomodation of our federal system [merely] give[s] the State an initial 'opportunity to pass upon and correct' alleged violations of prisoners' federal rights. Petitioners are not required to file 'repetitious applications' in the state courts. Nor does the mere possibility of success in additional proceedings bar federal relief." *Wilwording* v. *Swenson*, 404 U.S. 249, 250 (1971) (citations omitted). *See Picard* v. *Connor*, 404 U.S. 270, 275 (1971).

The Virginia Supreme Court's decision in *Sharp* relied on no intervening change of state or federal law. The state court decisions cited on the point of unconstitutionality of statutory presumptions antedated petitioners state appellate proceedings by at least eight years. The Virginia Supreme Court's quotation from *Leary* v. *United States*, 395 U.S. 6, 36 (1969) was identical to that set out in the petition for writ of error. *Compare Sharp* v. *Commonwealth, supra*, 192 S.E. 2d at 219, with Petition for Writ of Error, *Francisco* v. *Commonwealth*, Va. Sup. Ct., at 24 (Exhibit B). The Commonwealth met this argument on its merits without reliance on a single case. *See* Brief in Opposition to Petition for Writ of Error, *Francisco* v. *Commonwealth*, at 19 (Exhibit C). Further, determination of the issue requires no inquiry beyond the face of the trial record. Thus, under *Roberts* v. *Lavalle, supra*, petitioner is entitled to determination of the issue by a federal court.

Petitioner will be irreparably injured by requiring him to present his constitutional claims piecemeal in both federal and state courts. Petitioner has already been imprisoned for nearly two years. The claim at issue and the search and seizure claim were presented to the Virginia Supreme Court approximately eighteen months ago and were rejected by that court some five months later. It is urged that further delay is unwarranted. Should the state court rule in petitioner's favor on the instruction point, the judgment of conviction will be set aside and the cause remanded for a new trial. *See Sharp* v. *Commonwealth, supra*, 192 S.E. 2d 219. This could raise a question of mootness in peti-

tioner's appeal to the Fourth Circuit on the search and seizure issue in which event petitioner will be forced to again litigate the search and seizure issue in state trial and appellate court, presumably with the same result. The situation will then be identical to that existing prior to the filing of the petition for habeas corpus in the instant case. On the other hand, should the state court rule against petitioner on the instruction issue, petitioner will be required to seek appellate review of that ruling and, if necessary, again present the issue to this Court. Balanced against this injury to petitioner there appears to be no injury to respondent should the stay be granted.

Accordingly petitioner prays that proceedings in the Circuit Court of Fairfax County involving any matter of the instant case be stayed pending resolution of petitioner's appeal in the federal courts.

Respectfully submitted,

/s/ Daniel C. Kaufman
Attorney for Petitioner
6018 Craig Street
Springfield, Virginia 22150

[Certificate of Service Omitted in Printing]

VIRGINIA: EXHIBIT A

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FRANK XAVIER FRANCISCO,
PETITIONER,
vs.
J. S. GATHRIGHT, Superintendent, Bland Correctional Farm,
RESPONENT.

MOTION

Now comes the respondent, by counsel, and moves the Court as follows:

1. Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, Alexandria Division, alleging that his conviction in this Court on May 28, 1971, for possession of a controlled drug with intent to distribute was invalid. One of the allegations of his petition therein related to the fact that an instruction had been given to the jury relating to the statutory presumption of quantity of possession being the sole ground for a conviction for possession with intent to distribute.

2. In an order entered January 23, 1973, (a copy of which is attached hereto as an exhibit), the United States District Court deferred consideration of that allegation on the grounds that petitioner has not fully exhausted his state court remedies as to that allegation in light of the recent decision of the Virginia Supreme Court in the case of *Sharp* v. *Commonwealth*, 213 Va. 269, 192 S.E.2d 217 (1972).

3. In said order, the United States District Court instructed the Commonwealth on its own initiative to afford the petitioner a hearing within forty-five days on this issue.

4. Inasmuch as it would appear to be important for the courts of the State of Virginia to determine the merits of that allegation in light of *Sharp* v. *Commonwealth*, respondent feels that necessary proceedings should be in-

stituted in this Court as soon as possible to accomplish that purpose.

WHEREFORE, respondent moves this Court to immediately appoint counsel to represent the petitioner, and instruct said counsel to immediately file on behalf of said petitioner a petition for a writ of habeas corpus in this Court setting forth the allegation referred to above, and further, that a hearing be scheduled before this Court on said allegations within forty-five days from and after January 23, 1973.

J. S. GATHRIGHT, *Superintendent*,
Bland Correctional Farm

By Illegible
Counsel

Gilbert W. Haith
Assistant Attorney General
911 East Broad Street
Richmond, Virginia 23219

[Certificate of Service Omitted in Printing]

[Exhibits B and C Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

FRANK XAVIER FRANCISCO, PETITIONER, v. JOHN S. GATHRIGHT Superintendent of Bland Correctional Farm, RESPONDENT.	CIVIL ACTION NO. 430-72-A-M

ORDER

[Filed Feb. 16, 1973, Clerk, U. S. District Court, Alexandria, Virginia]

Upon consideration of the petitioner's Motion for Stay of Proceedings filed on February 12, 1973, oral argument on said motion is dispensed with and the motion is denied.

/s/ Illegible
United States District Judge

Alexandria, Virginia
February 16th, 1973

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-1313

FRANK XAVIER FRANCISCO, APPELLANT,

versus

J. S. GATHRIGHT, Supt.
Bland Correctional Farm, APPELLEE.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Submitted: May 14, 1973 Decided: Aug. 27, 1973

MEMORANDUM DECISION

Frank Xavier Francisco, a Virginia prisoner, seeks a certificate of probable cause to appeal a district court order denying his petition for a writ of habeas corpus.

Francisco was convicted of possession, with intent to distribute, of a controlled drug (heroin) in violation of *Va. Code Ann.* § 54-524.101(a). In his petition for federal habeas corpus relief he alleged that his arrest occurred without probable cause and that the subsequent search exceeded its permissible scope He also contended that the statutory presumption relating to possession with intent to distribute is unconstitutional. The state admitted that Francisco had presented these claims in his petition for a writ of error to the Virginia Supreme Court which denied review and affirmed the conviction by order on December 14, 1971. Subsequently, however, in the case of *Sharp v. Commonwealth*, 213 Va. 269, 192 S. E. 2d 217 (1972), the

Virginia Court held the statutory presumption to be unconstitutional and the state has admitted that Francisco's claim relative to the constitutional issue may now have merit under *Sharp*. However, the state asked that Francisco be required to submit his claim to the state courts since *Sharp* was decided after the State Supreme Court's denial of review in his case.

The district court agreed with the state "that it should be left to the state courts to determine whether the petitioner's case is controlled by *Sharp*." We affirm this holding. If the state does not comply with the mandate of the district court, Francisco can reapply to the district court for relief. We feel, however, that the district court was premature in reaching the merits of Francisco's allegations of illegal arrest and illegal search and seizure. If relief is granted under *Sharp*, the state will have the option of releasing Francisco or retrying him. In either event the possibility exists that this claim for relief will be mooted.

We therefore vacate that portion of the district court opinion denying relief on the claims of illegal arrest and illegal search and seizure, and direct the district court to dismiss these claims without prejudice. Francisco will therefore be free to reassert this claim if it is not mooted by further proceedings on his claim for relief under *Sharp*.

Accordingly, a certificate of probable cause to appeal is granted, the judgment of the district court is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

/s/ Illegible
Chief Judge, Fourth Circuit

/s/ Illegible
United States Circuit Judge

/s/ Illegible
United States Circuit Judge

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-1313

FRANK XAVIER FRANCISCO, APPELLANT,

versus

J. S. GATHRIGHT, Supt.
Bland Corectional Farm, APPELLEE.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in part, vacated in part, and remanded to the United States District Court for the Eastern District of Virginia, at Alexandria, for further proceedings consistent with this decision. A certificate of probable cause to appeal is granted.

[Filed Aug. 27, 1973, William K. Slate, II *Clerk*]

/s/ William K. Slate II
Clerk

SUPREME COURT OF THE UNITED STATES

No. 73-5768

FRANK XAVIER FRANCISCO,

PETITIONER,

v.

J. S. GATHRIGHT, Superintendent, Bland Correctional Farm

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 4, 1974

☆U.S. Government Printing Office: 1974—535-448/209